

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY L. POPE,  
Petitioner,  
v.  
D. K. SISTO, Warden,  
Respondent.  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
No. C 07-0434 CRB (PR)  
ORDER DENYING PETITION  
FOR A WRIT OF HABEAS  
CORPUS

Petitioner, a state prisoner incarcerated at California State Prison, Solano, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging his plea agreement and sentence. For the reasons set forth below, the petition is DENIED.

## STATEMENT OF THE FACTS

On December 26, 2002, petitioner went to a Walgreen's drug store in Oakland and gave the cashier a note stating, "I have a gun. Be quiet, give me the money." Respondent's Memorandum in Support of Points and Authorities in Support of Answer ("Answer") at 2:11-17. The cashier responded that she could not open the register and had no money. *Id.* Petitioner fled the store on foot and was subsequently apprehended by police about a block away from the Walgreen's store. *Id.*

## **STATEMENT OF THE CASE**

On February 17, 2004, petitioner pleaded no contest to attempted second degree robbery in the Superior Court of the State of California in and for the County of Alameda. In its complaint against petitioner, the state alleged nine prior felony convictions. As part of a plea agreement, petitioner admitted three of the prior felony convictions as “serious felonies” under California Penal Code § 667(a), and admitted that one of the three serious felonies was also a “strike” felony conviction under California Penal Code § 667(e). In exchange for his plea and admissions, petitioner was sentenced to 19 years in state prison (two years for attempted robbery, doubled due to the strike admission, plus five years for each of the three serious felony convictions). Petitioner did not appeal his conviction.

On December 16, 2004, petitioner began collaterally challenging his conviction and sentence in the state courts. Petitioner filed petitions for writs of habeas corpus in Alameda County Superior Court, the California Court of Appeal, and the Supreme Court of California. The Supreme Court of California denied his final petition for a writ of habeas corpus on January 17, 2007.

On January 23, 2007, petitioner filed the instant federal action for a writ of habeas corpus under 28 U.S.C. § 2254. On July 24, 2007, petitioner filed a second amended petition for a writ of habeas corpus, in which he challenged his conviction and sentence on 11 grounds. Per order filed on December 14, 2007, the Court dismissed petitioner's claims of pre-plea constitutional violations, which consisted of claims 1 through 6. The Court preserved petitioner's remaining claims, finding that, when liberally construed, the petition stated minimally cognizable claims, and ordered respondent to show cause why a writ of habeas corpus should not be granted. On March 6, 2008, respondent filed a

1 motion to dismiss petitioner's writ of habeas corpus as untimely, claiming that  
2 petitioner's motion was filed beyond the one-year statute of limitations. Per  
3 order dated November 10, 2008, the Court denied respondent's motion to  
4 dismiss, and again ordered respondent to show cause as to why a writ of habeas  
5 corpus should not be granted. On March 5, 2009, respondent filed a  
6 memorandum of points and authorities in support of its answer to the Court's  
7 order to show cause.

8 Now before the Court are petitioner's five remaining grounds for habeas  
9 relief: (1) that the California Penal Code has no specified sentence for second  
10 degree attempted robbery; (2) that petitioner should not be required to serve 80  
11 percent of his sentence; (3) that three strikes cases cannot be used in plea  
12 agreements; (4) that the abstract of judgment does not accurately reflect the  
13 convictions to which petitioner admitted as part of his plea; and (5) that the prior  
14 convictions cannot be used as sentence enhancements because they were not  
15 proven by a jury.

## 16 DISCUSSION

### 17 A. Standard of Review

18 This Court may entertain a petition for a writ of habeas corpus "in behalf  
19 of a person in custody pursuant to the judgment of a State court only on the  
20 ground that he is in custody in violation of the Constitution or laws or treaties of  
21 the United States." 28 U.S.C. § 2254(a).

22 The writ may not be granted with respect to any claim that was  
23 adjudicated on the merits in state court unless the state court's adjudication of the  
24 claim: "(1) resulted in a decision that was contrary to, or involved an  
25 unreasonable application of, clearly established Federal law, as determined by the  
26 Supreme Court of the United States; or (2) resulted in a decision that was based  
27

1 on an unreasonable determination of the facts in light of the evidence presented  
 2 in the State court proceeding.” *Id.* § 2254(d).

3 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ  
 4 if the state court arrives at a conclusion opposite to that reached by [the Supreme]  
 5 Court on a question of law or if the state court decides a case differently than  
 6 [the] Court has on a set of materially indistinguishable facts.” *Williams v.*  
 7 *Taylor*, 529 U.S. 362, 412-13 (2000). “Under the ‘reasonable application clause,’  
 8 a federal habeas court may grant the writ if the state court identifies the correct  
 9 governing legal principle from [the] Court’s decisions but unreasonably applies  
 10 that principle to the facts of the prisoner’s case.” *Id.* at 413.

11 “[A] federal habeas court may not issue the writ simply because the court  
 12 concludes in its independent judgment that the relevant state-court decision  
 13 applied clearly established federal law erroneously or incorrectly. Rather, that  
 14 application must also be unreasonable.” *Id.* at 411. A federal habeas court  
 15 making the “unreasonable application” inquiry should ask whether the state  
 16 court’s application of clearly established federal law was “objectively  
 17 unreasonable.” *Id.* at 409.

18 The only definitive source of clearly established federal law under 28  
 19 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme  
 20 Court as of the time of the state court decision. *Id.* at 412; *Clark v. Murphy*, 331  
 21 F.3d 1062, 1069 (9th Cir. 2003). While circuit law may be “persuasive  
 22 authority” for purposes of determining whether a state court decision is an  
 23 unreasonable application of Supreme Court precedent, only the Supreme Court’s  
 24 holdings are binding on the state courts and only those holdings need be  
 25 “reasonably” applied. *Id.*

26       ///

111

**B. Claims**

## **1. Sentence for Second Degree Attempted Robbery**

Petitioner claims that the California Penal Code provides “no specific time guidelines” for the crime of attempted robbery. Second Amended Petition for a Writ of Habeas Corpus (“Petition”) at 6, continuation at 1. This claim is without merit.

Petitioner pleaded no contest to attempted second degree robbery in violation of California Penal Code §§ 211 and 664. Petition Ex. D at 5:8-11. Petitioner correctly notes that California Penal Code § 212.5(c), which defines second degree robbery, does not specify a sentence for the crime. However, the California Penal Code explicitly provides for a punishment of “imprisonment in the state prison for two, three, or five years” for second degree robbery. Cal. Penal Code § 213(a)(2). Attempted crimes are punishable by “one-half the term of imprisonment prescribed upon a conviction of the offense attempted.” Cal. Penal Code § 664. Contrary to petitioner’s assertion, the California Penal Code specifies possible sentences for the crime of second degree attempted robbery.

A related claim not explicitly advanced by petitioner is that the sentencing judge may not have given an appropriate sentence based on the penal code provisions. In sentencing petitioner for attempted second degree robbery, the court stated, “For his conviction of attempted second-degree robbery, he’s sentenced to the midterm of two years.” Petition, Ex. E at 1:11-13. The judge doubled the sentence based on petitioner’s admitted strike conviction and added five years for each admitted “serious felony” resulting in a total sentence of 19 years. If the court truly meant to sentence petitioner to the “midterm” sentence,

1 his sentence would have been 1.5 years (half of the midterm 3 year sentence  
 2 because it is an attempted crime), doubled due to the strike conviction for a total  
 3 of 3 rather than 4 years, prior to serious felony enhancements.

4       But, even if petitioner had explicitly advanced and exhausted a claim that  
 5 his sentence was improperly calculated or that California sentencing law was  
 6 misapplied, his claim would not be actionable under federal habeas law absent a  
 7 showing of fundamental unfairness. Christian v. Rhode, 41 F.3d 461, 469 (9th  
 8 Cir. 1994) (holding that “[a]bsent a showing of fundamental unfairness, a state  
 9 court’s misapplication of its own sentencing laws does not justify federal habeas  
 10 relief”); see also Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989)  
 11 (holding that whether assault with deadly weapon qualifies as a “serious felony”  
 12 under California’s sentence enhancement provisions is a question of state  
 13 sentencing law and does not state a constitutional claim). Here, it is difficult to  
 14 argue that a two year sentence for attempted second degree robbery is  
 15 fundamentally unfair. The law allows up to 5 years imprisonment for second  
 16 degree robbery and, in turn, 2.5 years for attempted second degree robbery. With  
 17 petitioner’s admitted strike conviction and prior “serious felony” convictions,  
 18 petitioner was subject to a maximum penalty of 20 years imprisonment.  
 19 Petitioner actually received a sentence of less than the statutory maximum.

20       Furthermore, petitioner entered his plea with the understanding that he  
 21 would be sentenced to 19 years, the sentence he ultimately received:

22 [THE COURT: ] I understand there is a disposition in this matter in  
 23 which Mr. Pope will be pleading no contest to the first count,  
 24 attempted second degree robbery, with the understanding that I’ll  
 find him guilty of that offense. . . .

25       With the understanding, then, that he would receive the midterm of  
 26 two years on the attempted robbery doubled because of the strike  
 27 for a total of four. Consecutive to that, he would receive five years  
 for each of the serious felony 667(a) priors for a total of 15 years on  
 the priors for an overall total of 19 years in State Prison.

1 Is that your understanding, Mr. CROFTON?

2 MR. CROFTON: That is my understanding. It's also Mr. Pope's  
3 understanding.

4 THE COURT: Mr. Pope?

5 THE DEFENDANT: Yes.

6 Petition Ex. D at 2:7-28. Because petitioner entered into his plea agreement with  
7 the knowledge that he would receive a sentence of 19 years, and because this  
8 sentence does not exceed the statutory maximum given his admitted prior  
9 convictions, petitioner's sentence is not fundamentally unfair and actionable in  
federal habeas. See Christian, 41 F.3d at 469.

10 **2. Requirement to Serve 80 Percent of Sentence**

11 Petitioner claims that he should not be required to serve 80 percent of his  
12 sentence because his priors were stricken under California Penal Code § 1385.  
13 Petition at 6, continuation at 1. This claim is without merit.

14 Petitioner's contention is inconsistent with the California Penal Code,  
15 which provides that "if a defendant has been convicted of a felony and it has been  
16 pled and proved that the defendant has one or more prior [strike] felony  
17 convictions, . . . [t]he total amount of credits awarded . . . shall not exceed  
18 one-fifth of the total term of imprisonment imposed. . ." Cal. Penal Code §  
19 1170.12. Put simply, a defendant convicted of a felony and a prior strike  
20 conviction may receive no more than 20 percent "credit" on his sentence,  
21 meaning he must serve at least 80 percent of his sentence.

22 Here, petitioner admitted to three prior serious felony convictions, one of  
23 which he admitted was a "strike" felony. Petition Ex. D at 2:7-28. Petitioner  
24 also understood at the time of his change of plea hearing that the judge would  
25 find him guilty of attempted second degree robbery, which "itself [would] be a  
26 serious felony strike conviction. . ." Id. at 2:14-22. Under section 1170.12, since

1 petitioner was convicted of a felony and had a prior strike felony conviction, he  
2 was entitled to no more than one-fifth credit on his sentence. His sentence was  
3 appropriately rendered.

4 Furthermore, petitioner entered his plea with the understanding that he  
5 would have to serve 80 percent of his sentence. An “intelligently made” plea  
6 “entered by one fully aware of the direct consequences . . . must stand unless  
7 induced by threats . . . misrepresentation. . . or . . . by promises that are by their  
8 nature improper.” Brady v. United States, 397 U.S. 742, 755-56 (1970) (quoting  
9 Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). The transcript  
10 of the plea hearing plays a significant role in an inquiry into the validity of a plea:

11 For the representations of the defendant, his lawyer, and the  
12 prosecutor at such a hearing, as well as any findings made by the  
13 judge accepting the plea, constitute a formidable barrier in any  
14 subsequent collateral proceedings. Solemn declarations in open  
15 court carry a strong presumption of verity. The subsequent  
16 presentation of conclusory allegations unsupported by specifics is  
17 subject to summary dismissal, as are contentions that in the face of  
18 the record are wholly incredible.

19 Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (citations omitted).

20 Here, the record shows that before petitioner pleaded no contest to the  
21 charges and admitted the prior convictions, the state trial court advised him of the  
22 direct consequences of his plea. At the time of his change of plea hearing, the  
23 court explained, and petitioner acknowledged his understanding, that as a result  
24 of his admission of a prior “strike” conviction he would have to serve 80 percent  
25 of his sentence:

26 THE COURT: Okay. Now, Mr. Pope, you need to understand that  
27 because of the strike conviction, it causes a couple of things. It not  
28 only causes that sentence to be doubled, as we just discussed, but it  
requires that you serve 80 percent of this sentence as opposed to the  
50 percent that folks often serve in State Prison.

29 Do you understand that?

30 THE DEFENDANT: Yes.

Petition, Ex. D at 2:3-10. Petitioner stated in open court that he understood the consequences of his plea and admissions. Id. The trial court judge accepted petitioner's pleas and admission, specifically finding "a knowing, voluntary, intelligent waiver of [petitioner's] rights." Id. at 5:6-7.

Petitioner was aware of the direct consequences of his plea and admissions in court. His claim is insufficient for habeas relief.

### **3. Use of Strike Convictions in Plea Agreements**

Petitioner claims that his plea is invalid because "three strikes cases can't be used in plea agreements." Petition at 6, continuation page 2. This claim is without merit.

California Penal Code § 1170.12(e) provides that "[p]rior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7." However, the same section provides that a "prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice . . ." Cal. Penal Code § 1170.12(d)(2). Under California Penal Code § 667(a), "any person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately."

Here, rather than pursuing sentence enhancements for all of petitioner's prior felony convictions as mandated by section 667(a), the prosecution struck several of petitioner's prior convictions "in the furtherance of justice" in accordance with section 1170.12(d)(2). Even if the prosecution's plea offer amounts to "use" of a prior felony conviction in plea bargains in violation of section 1170.12(e), petitioner cannot show any prejudice, as the error worked in

1 his favor.

2       **4. Prior Convictions in Abstract of Judgment**

3 Petitioner claims that he is entitled to habeas relief because his abstract of  
 4 judgment is inconsistent with his plea: "According to my 2004 change of plea the  
 5 judge, D.A., my attorney, and me agreed on using priors 1, 2, & 4 to sentence me.  
 6 My abstract of judgement says I was sentenced to priors 1, 2 & 3." Petition at 5,  
 7 continuation p. 2. This claim is without merit.

8 As part of his plea of no contest to attempted second degree robbery,  
 9 petitioner agreed to admit three prior serious felonies. Petition, Ex. D at 1-2. At  
 10 the time of his change of plea, the sentencing judge summarized the prior  
 11 convictions to which petitioner admitted as a condition of his plea agreement:

12 He will . . . admit his first prior conviction as both a serious felony  
 13 under 667(a) and a strike prior under 667(e). He'll admit his second  
 14 prior conviction as a serious felony under 667(a) and his third prior  
 15 conviction as a serious felony under 667(a).

16 Petition, Ex. D at 1. The judge then recited each of the three prior convictions,  
 17 (1) a second degree robbery conviction on August 16, 1994, (2) a second degree  
 18 robbery conviction on April 20, 1994, and (3) a first degree residential burglary  
 19 on September 1, 1987. *Id.* at 5. These correspond to the first, second, and fourth  
 20 prior convictions alleged in the complaint. Petition Ex. B at 1-2. The abstract of  
 21 judgment lists three convictions used as enhancements to petitioner's sentence:  
 22 "667(a) 1<sup>ST</sup> PRIOR," "667(a) 2<sup>ND</sup> PRIOR," and "667(a) 3<sup>RD</sup> PRIOR." Petition  
 23 Ex. C.

24 It is not clear whether the numbering in the abstract of judgment  
 25 corresponds to the prior convictions alleged in the complaint. But, the fact that  
 26 the prior convictions are numbered 1, 2, and 3 in the abstract as opposed to 1, 2,  
 27 and 4 is not meaningful. Even if the prior convictions listed in the abstract of  
 judgment were not the convictions petitioner admitted to as part of his plea,

1 petitioner has failed to demonstrate any effect on his judgment or sentence as a  
 2 result of the error. See 28 U.S.C. §§ 2241(c)(3), 2254(a). Because petitioner has  
 3 neither proven any error in his abstract of judgment nor demonstrated any  
 4 prejudice as a result of a potential error, this claim must be rejected.

5 **5. Proof of Prior Convictions**

6 Petitioner claims that his sentence is improper because the prior felony  
 7 conviction enhancements were not proven by a jury. This claim is without merit.

8 Generally, “any fact that increases the penalty for a crime beyond the  
 9 prescribed statutory maximum must be submitted to a jury, and proved beyond a  
 10 reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). But, the  
 11 Supreme Court specifically exempted from this requirement enhancements based  
 12 on “the fact of a prior conviction.” *Id; see also Jones v. United States*, 526 U.S.  
 13 227, 249 (1999) (holding that no jury trial is necessary to prove the fact of a prior  
 14 conviction because “a prior conviction must itself have been established through  
 15 procedures satisfying the fair notice, reasonable doubt, and jury trial  
 16 guarantees”). Prior convictions considered in sentencing are factors rather than  
 17 elements of a crime, and thus need not be presented to a jury and proven beyond  
 18 a reasonable doubt. United States v. Pacheco-Zepeda, 234 F.3d 411, 414-15 (9th  
 19 Cir. 2001).

20 Even if his prior convictions had to be proven by a jury, petitioner waived  
 21 a jury trial when he admitted his prior convictions as part of his plea. See  
 22 Petition Ex. D at 1. After petitioner admitted three prior felony convictions, the  
 23 judge asked, “Is there a factual basis for the plea and the admission?” Id. at 6.  
 24 Petitioner’s attorney Mr. Crofton responded, “There is.” Id. Petitioner’s own  
 25 admissions as part of his plea make a jury trial as to the prior convictions  
 26 unnecessary. See, e.g., Brady v. United States, 397 U.S. 742, 748, 757 (1970)

